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RICHMOND POLICE OFFICERS' ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

WALNUT CREEK POLICE OFFICERS' ASSOCIATION,

Petitioner/Plaintiff,

vs.

CITY OF WALNUT CREEK; TOM CHAPLIN, Chief of Police; and DOES 1 through 20, inclusive,

Respondents/Defendants,

FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING,

and

ACLU OF NORTHERN CALIFORNIA,

Intervenors.

CASE NO.: N19-0109

PETITIONERS' REPLY TO OPPOSITIONS OF INTERVENORS ACLU OF NORTHERN CALIFORNIA AND RICHARD PEREZ

[COMBINED CAPTION AS DIRECTED BY COURT]

DATE: FEBRUARY 8, 2019
TIME: 1:30 P.M.
DEPT.: 12

PETITION FILED: JANUARY 22, 2019

ANTIOCH POLICE OFFICERS' ASSOCIATION, Petitioner/Plaintiff, vs. CITY OF ANTIOCH; TAMMANY BROOKS, Chief of Police; and Does 1 through 20, inclusive, Respondents/Defendants, FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING, and ACLU OF NORTHERN CALIFORNIA, Intervenors.	CASE NO.: N19-0170 PETITION FILED: JANUARY 24, 2019
CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASSOCIATION, Petitioner/Plaintiff, vs. COUNTY OF CONTRA COSTA; DAVID O. LIVINGSTON, Sheriff of the County of Contra Costa; and Does 1 through 20, inclusive, Respondents/Defendants, FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING, and ACLU OF NORTHERN CALIFORNIA, Intervenors.	CASE NO.: N19-0097 PETITION FILED: JANUARY 24, 2019

CONCORD POLICE ASSOCIATION, Petitioner/Plaintiff, vs. CITY OF CONCORD; GUY SWANGER, Chief of Police; and Does 1 through 20, inclusive, Respondents/Defendants, FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING, and ACLU OF NORTHERN CALIFORNIA, Intervenors.	CASE NO.: N19-0166 PETITION FILED: JANUARY 24, 2019
MARTINEZ POLICE OFFICERS' ASSOCIATION, Petitioner/Plaintiff, vs. CITY OF MARTINEZ; MANJIT SAPPAL, Chief of Police; and Does 1 through 20, inclusive, Respondents/Defendants, FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING, and ACLU OF NORTHERN CALIFORNIA, Intervenors.	CASE NO.: N19-0167 PETITION FILED: JANUARY 24, 2019

RICHMOND POLICE OFFICERS' ASSOCIATION,

Petitioner/Plaintiff,

vs.

CITY OF RICHMOND; ALLWYN BROWN, Chief of Police; and Does 1 through 20, inclusive,

Respondents/Defendants,

FIRST AMENDMENT COALITION, CALIFORNIA NEWSPAPERS PARTNERSHIP L.P. (d/b/a Bay Area News Group), INVESTIGATIVE STUDIOS, KQED, INC., and THE CENTER FOR INVESTIGATIVE REPORTING,

and

ACLU OF NORTHERN CALIFORNIA and RICHARD PEREZ,

Intervenors.

CASE NO.: N19-0169

PETITION FILED: JANUARY 24, 2019

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I. INTRODUCTION

Petitioners Walnut Creek Police Officers' Association ("WCPOA"), Antioch Police Officers' Association ("APOA"), Contra Costa County Deputy Sheriffs' Association ("CCCDSA"), Concord Police Association ("CPA"), Martinez Police Officers' Association ("MPOA") and Richmond Police Officers' Association ("RPOA") (collectively referred to as "Petitioners" or "Associations") hereby submit their Reply Brief to the Oppositions filed by Intervenors ACLU of Northern California ("ACLU") and Richard Perez ("Perez")[1] (collectively referred to as "Intervenors").

Intervenors contend that the plain legislative language and intent establish that California Senate Bill 1421, enacted as Chapter 988 of the 2017-2018 Regular Session ("SB 1421") must be applied retroactively. Yet, Intervenors fail to provide any clear statement of legislative intent in either the statute itself or in the history that meets the requisite standard to retroactively rescind privacy rights existing prior to SB 1421's operative date. Without such evidence of intent, the law requires that SB 1421 must be applied prospectively only, such that Petitioners' members retain their right to privacy of the information contained within their personnel files reflecting conduct occurring prior to SB 1421's operative date, January 1, 2019.

Intervenors further contend that applying SB 1421 in a manner requiring the disclosure of personnel record information reflecting conduct occurring prior to the new law's operative date is not in fact a retroactive application because the relevant triggering event, a public agency's disclosure of records upon request pursuant to the California Public Records Act ("CPRA"), Government Code section 6250 et seq., occurs after the effective date of the statute. This argument must fail, however, because it misconstrues the nature of the existing privacy rights implicated in this case. Pursuant to the law existing prior to SB 1421, peace officers acquired an individual right to maintain the confidentiality of their peace officer personnel file information, a privacy right which extends beyond any physical records encompassing this information. Appropriately understanding this existing right is critical, because it demonstrates that Intervenors' exclusive focus on the general obligations imposed on peace officer employers under the CPRA is misplaced, since the relevant triggering event for the

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[1] Mr. Perez has intervened only with respect to the *Richmond Police Officers' Association* matter, Case No. N19-0169.

retroactivity analysis – the peace officer conduct itself – occurred prior to and was completed before SB 1421's amendments. Focusing on general public agency obligations under the CPRA is a red herring – it is obviously true that public agencies must disclose public records not exempt from disclosure. The issues here, however, appropriately turn on whether SB 1421 removed the exemption that has *already attached* to personnel file information arising prior to SB 1421's amendments. That is, whether the Legislature intended to eviscerate *individual* privacy rights to personnel file *information* acquired *prior to* SB 1421's operative date. Disclosing information reflecting conduct which occurred prior to SB 1421's operative date would clearly retroactively eviscerate this already-acquired confidentiality privilege. Because there is no indication the Legislature intended as such, applying SB 1421's amendments to disclose such information constitutes an unlawful retroactive application of the new law.

II. ARGUMENT

A. SB 1421 Does Not Include an Express Retroactivity Provision

As reflected in the TRO Applications, the plain statutory language of SB 1421 does not include an express retroactivity provision nor establish that the statute should be applied retroactively. Therefore, pursuant to the clear tenets of the retroactive analysis, the Court must conclude that the statute should operate prospectively only. Intervenors do not cite to any clear statutory language that would indicate an intent to apply SB 1421 retroactively. Instead, they rely on the statutes' continued use of the words "maintained" and "any" as evidence of clear legislative intent. However, the continued use of the word "maintained" here cannot represent the clear legislative intent required to establish retroactive application because the statute does not specify that all records *already* maintained are now subject to disclosure. "Maintain" by itself does not mean to preserve what is already in existence as opposed to preserve certain records going forward. Moreover, the use of the word "maintain" cannot establish the Legislature's intent to retroactively apply SB 1421's amendments because the *word was already present* in sections 832.7 and 832.8 prior to SB 1421, *with a specific purpose unrelated to a temporal application of its terms* drafted by a Legislature that deemed all personnel files confidential. Section 832.7 always included the word "maintained" so as to make clear that the confidentiality right extended beyond a peace officer's official personnel file retained by an

employer to include records held by an employing agency pursuant to its obligations under Section 832.5. (Penal Code § 832.7 ["personnel records *and records maintained by any state or local agency pursuant to Section 832.5*, or information obtained from these records, are confidential…] Emphasis added.) The use of the word "maintained" in Section 832.8 is merely a reference to those records identified in Section 832.7, and also makes clear that the confidentiality right extends to any type of file held by the particular peace officer's employing agency, no matter how designated, which includes the enumerated categories of information, identified by reference to a particular peace officer. (Penal Code § 832.8 ["As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following…").]

The use of the words "any" and "all" also does not support the contention that all *past* records must be disclosed. The use of the word "any" does not evidence a clear intention to apply statutory amendments retroactively, as opposed to a *continued intent* to ensure broad application of the statutory provisions going forward. Indeed, in neither case cited by Intervenors was the use of the word "any" held to establish the clear statutory language necessary to apply a statute retroactively. For example, in *In re E.J.* (2010) 47 Cal.4th 1258, the Supreme Court determined that a statute mandating certain residency requirements for paroled sex offenders did not apply retroactively, as "[e]ach of these four petitioners was released from custody on his current parole and took up residency in noncompliant housing after section 3003.5(b)'s effective date." (*Id.* at p. 1272.) In *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, the Court of Appeal noted that the use of the word "all" was "compatible with the premise that the Legislature intended the statute to clarify existing law." (*Id.* at p. 1146.) As the court noted, "[a] legislative clarification establishes the true legislative intent without changing the past legal consequences of the statute as properly understood." (*Ibid.*) Here, on the other hand, there is no indication that SB 1421 did not "clarify" existing law regarding the privacy rights possessed by officers – it sought to prospectively remove those rights.

Furthermore, like the phrase "maintained," the word "any" predated SB 1421 and had a similar specific purpose unrelated to a temporal application of its terms – to ensure that the confidentiality right extended to records held by an employing agency outside of an officially-designated "personnel

file." (*Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 99 ["there is *nothing* in the statutory scheme or its history suggesting a legislative intent to exclude from the privileged information which happens to be obtainable elsewhere."] Original emphasis.) This is because the confidentiality right is informational, not document or record specific, no matter where documents including that confidential information are stored by an employer. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 291 ["Cases that have addressed the question whether a particular document is included within the term 'personnel files' for purposes of other statutes have found the content of the document at issue, not the location in which it is stored, to be determinative"].)

Intervenors next argue that the statute should apply retroactively because SB 1421 operates in conjunction with the CPRA, which requires the production of records "in the possession of the agency." (Gov. Code §6253, subd. (c).) However, as the same subdivision makes clear, the agency must still "determine[] that the request seeks disclosable public records...." (*Ibid.*) It is undisputed that, previously, peace officer personnel records were not subject to disclosure, and could only be produced pursuant to the *Pitchess* process. The issue to be adjudicated in this case is whether the preexisting statutory exemption continues to apply for information that has already arisen or whether SB 1421 has removed that exemption for that information retroactively. The text of the CPRA cannot help determine whether SB 1421 should be applied retroactively because the CPRA does not contain any indication that all *existing information previously designated exempt from disclosure* should now be subject to such disclosure. More importantly, the CPRA is a statutory scheme for document production. Because the Legislature knew it was amending a statute affording an information privilege, had it intended to retroactively unwind already-acquired privacy rights to that information, it would have unambiguously said so, rather than merely rely on coherence with a document production scheme. (Verified Petition for Writ of Traditional Mandate [CCP § 1085]; Complaint for Declaratory and Injunctive Relief ("Petition"), Exhibit ("Exh.") A, SB 1421 Legislative Counsel's Digest ["Existing law requires any peace officer ... personnel records ... *or any information obtained from these records*, to be confidential...] emphasis added; *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500 ["The Legislature is presumed to know existing law when it enacts a new

statute…"].) For the same reasons, reference to existing definitions in the CPRA is unhelpful because peace officer personnel records were presumably always fell within the general definition of "public records," they were just exempt from disclosure.

B. THE LEGISLATIVE HISTORY CONTAINS NO CLEAR INTENT TO APPLY SB 1421'S AMENDMENTS RETROACTIVELY

Intervenors have failed to put forth a clear statement of legislative intent to retroactively apply SB 1421s amendments. It is their burden to do so to overcome the strong presumption of prospective operation. (*People v. Brown* (2012) 54 Cal.4th 314, 324.) To support their contention, Intervenors cite only to the inclusion of an opposition to SB 1421 submitted by the Los Angeles County Professional Peace Officer Association ("PPOA"). (Intervenors ACLU and Richard Perez's Opposition To Plaintiffs' OSC Re: Preliminary Injunction ("Opposition"), p. 6.) However, merely because *PPOA* opined that the law would be "retroactive in its impact" does not mean that the *Legislature* so intended. The relevant inquiry is the *collective intent* of the Legislature, which cannot be gleaned from the statements of individual interested persons, even individual legislators that voted on the bill, *including the principal author of the bill herself.* (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 569 ["In construing a statute 'we do not consider the motives or understandings of an individual legislator even if he or she authored the statute'"].) Intervenors suggest that the lobbyist's letter "indicates that the Legislature intended the law to apply in just the way" stated, because the Legislature was "warned" of a potential retroactive application and took no action. (Opposition, p. 6.) This is a purely speculative assertion with no supporting evidence. *At best*, this is an ambiguous reference to legislative intent, which falls far short of the required standard. (*Myers v. Phillip Morris Cos.* (2002) 28 Cal.4th 828, 841; *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1578 ["the wisest course is to rely on legislative history only when that history itself is unambiguous"].)

Albertson v. Superior Court (2001) 25 Cal.4th 796, cited by Intervenors, is actually instructive of how the legislative history here fails to provide the required manifest intent of retroactivity. In that case, not only did the ACLU raise objections to a statute, but objections were raised by the Assembly Committee on Public Safety. (*Id.* at pp. 806-07.) Thereafter, not only did the Assembly leave intact the objected-to provisions, it actually amended the bill in such a way to indicate a clear intent to reject the

concerns raised by ACLU and the Committee. (*Id.* at p. 807.) Here, on the other hand, there is no evidence of any subsequent amendment to SB 1421 after the lobbyist's opposition was noted in the Committee Report. Intervenors have cited no authority that permits an inference of intent from the Legislature's *failure* to amend legislation, nor should this logically be the appropriate analysis. (*Myers*, *supra*, 28 Cal.4th at p. 841.) If the Legislature had intended SB 1421 to operate retroactively, it would have expressly stated as such. (*Aetna Cas. & Sur. Co. v. Indus. Accident Comm'n* (1947) 30 Cal.2d 388, 396 ["[I]t must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended"].) Because it did not do so here, SB 1421's amendments cannot be lawfully applied retroactively.

C. Applying SB 1421's Amendments to Rescind Previously-Acquired Confidentiality Rights Would Unquestionably Constitute a Retroactive Application

In a last-ditch effort to salvage their flawed interpretation of SB 1421's amendments, Intervenors contend disclosing personnel file information which occurred prior to SB 1421's operative date is not a retroactive application of the new law. Intervenors' argument is premised on the assertion that the new law only imposes new obligations upon agencies, and those obligations are prospective – they went into effect only after January 1 and apply to CPRA requests pending after that date. (Opposition, 7:14-16.) However, Intervenors' arguments fail for two simple reasons (a) they completely omit any reference to or consideration of peace officers' *individual* privacy rights to personnel file *information* acquired prior to SB 1421's operative date, and (b) they misconstrue SB 1421's amendments as solely affecting the procedural obligations imposed on public agencies under the CPRA.

As discussed in detail in Petitioners' TRO Applications, peace officers had an individual informational confidentiality right to all their personnel file information prior to SB 1421's operative date, not merely a right prohibiting their employers from producing physical documents. This privacy right extended beyond the actual "files" or "records" maintained by public agencies to encompass the *information* contained in or obtained from those documents, and was readily enforced by the courts in circumstances not involving any particular peace officer's employer. (Pen. Code § 832.7(a) ["Peace

officer… personnel records ... *or information obtained from these records*, are confidential…", emphasis added]); Cal. Const. art. I, § 3, subd. (b), par. (3); *Hackett v. Superior Court, supra,* 13 Cal.App.4th at pp. 98-99; *City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236, 239.) The Legislature itself acknowledged the informational nature of the existing privilege when it enacted SB 1421. (Pet. ¶ 9, Exh. A, Legislative Counsel's Digest.) In light of this fact, Intervenors widely miss the mark when they premise their "prospective" arguments on the *public agencies'* obligations under the CPRA to produce *physical documents*. (Opposition, pp. 7-8.) Noticeably absent from Intervenors' reasoning is any reference to peace officers' existing individual confidentiality right to the information contained within their personnel records. These rights, established prior to SB 1421's operative date, exist separate and apart from any documents reflecting the confidential information contained therein, and any employer involvement in disclosure. (See *City of San Diego, supra,* 136 Cal.App.3d at p. 339 [confidentiality right allows peace officer to refrain from disclosing personnel file information during oral deposition].)

Intervenors' convenient misconstruction of that previously-acquired confidentiality right allows them to rely on case law stating that the "critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date," to argue that *the CPRA request* is the "last act or event" triggering the retroactive analysis. (Opposition, pp. 8:10-13, 9, citations omitted.) Of course, if the confidentiality right is properly understood, "the last act or event" is *the peace officer conduct itself*, not any subsequently filed CPRA request for the production of physical documents containing information reflecting that conduct. At the time pre-SB 1421 peace officer conduct occurred, such conduct and the information derived therefrom was "completed" and deemed confidential by law. Rescinding the confidentiality of that information constitutes a "new legal consequence to events completed before" the new law's operative date – a retroactive application of SB 1421.

None of the cases cited by Intervenors establish that the removal of previously-existing privacy rights would be prospective, not retroactive. *Kizer v. Hanna* (1989) 48 Cal.3d 1 did not concern rights, but instead whether an estate would need to reimburse the Department of Health Services for Medi-Cal benefits received before the decedent's death. (*Id.* at pp. 3-4.) Notably, the Supreme Court held that the

new statute authorizing the repayment of such benefits "affects only estates arising after the statute's effective date and that there is no legislative intent to the contrary." (*Id.* at p. 7.) Accordingly, because the estate in question was not even in – existence on the effective date of the statute – as the Medi-Cal recipient was not yet deceased – there could be no retroactive effect because there was simply nothing for the statute to impact until the recipient had passed.

People v. McClinton (2018) 29 Cal.App.5th 738 is similarly inapplicable because that case is founded upon the well-established premise that "a law addressing the conduct of trials still addresses conduct in the future." (*Id.* at p. 753; citations omitted.) Here, the appropriate focus is whether SB 1421 was intended to alter the existing legal status of information completed prior to January 1, 2019. Moreover, the statutory amendment in *McClinton* narrowly tailored the disclosure of records for "use [] in [the] proceedings under this article" solely and prohibited the recipients of those records from disclosure outside of those proceedings. (*Id.* at p. 751.) In this case, Petitioners' members are not protected by statutory gag orders on the information sought by Intervenors, nor are Intervenors seeking information for the sole purpose of adjudicating the mental health of an accused sexually violent predator for which medical evaluation information is necessary.

Interpreting SB 1421's amendments to allow disclosure of information which arose from acts occurring prior to the new law's operative date would be a retroactive application. Doing so will rescind individual confidentiality rights already acquired by existing law when the information itself arose, thereby significantly impacting the legal status of that information. As repeatedly stated by the Supreme Court, "[a] retrospective law is one which affects *rights*, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (*Aetna Cas. & Sur. Co., supra*, 30 Cal.2d at p. 391, emphasis added.) "[I]t has long been established that a statute *that interferes with antecedent rights* will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" (*McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 475.)

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D. RETROACTIVE APPLICATION OF SB 1421 WOULD IMPERMISSIBLY AFFECT PEACE OFFICERS' PREEXISTING PRIVACY RIGHTS

Petitioners' members' right to maintain the confidentiality of the information contained within their personnel files has been repeatedly recognized by the courts as a "privacy right" – not a remedy. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1300; *City of Santa Cruz v. Superior Court* (1989) 49 Cal.3d 74, 83-84.) The California Constitution acknowledges this as a privacy right. (Cal. Const., art. I, § 3, subd. (b), par. (3); *Commission on Peace Officer Standards & Training v. Superior Court, supra,* 42 Cal.4th at p. 288 ["The Constitution [] recognizes the right to privacy and specifically acknowledges the statutory procedures that protect the privacy of peace officers"].) Intervenors' cited authority relates to a statutorily created *remedy*, not a preexisting right such as the right to privacy. "[A] ***cause of action or remedy*** de[p]endant on a statute falls with a repeal of the statute, even after the action thereon is pending." (*Callet v. Alioto* (1930) 210 Cal. 65, 67, emphasis added.) *Younger v. Superior Court* (1978) 21 Cal.3d 102 also involved a remedy, not a privacy right. (*Id.* at p. 109 ["there is no common law right to erasure or return of records of an arrest not followed by a conviction."].) (*Id.* at p. 109.)

Michael v. Gates (1995) 38 Cal.App.4th 737 does not establish that a peace officer has no privacy interest in his or her personnel file, and therefore the retroactive application of SB 1421 would impact that existing right. First, it should be noted that the Court of Appeal was careful to limit the holding of the case to the facts before it, in which a City Attorney accessed Michael's personnel records to defend against a civil suit brought by a plaintiff in which Michael was to testify as a witness against the Department. As the Court of Appeal stated, "We determine that the Evidence Code's procedural requirements are not applicable to *the facts just described, and that under those circumstances*, inspection of records by the law enforcement agency and its attorney violates no statutory or constitutional right." (*Id.* at p. 740.) The Court of Appeal then recognized that the statutory scheme actually demands that a "governmental agency and its lawyer *will* review those records, without noticed motion or court order." (*Id.* at p. 744.) Accordingly, in those circumstances, Michael had no reasonable expectation of privacy in his records and the *Pitchess* process was not violated. There are no similar facts here.

Furthermore, merely because some information may be disclosed through the *Pitchess* process does not mean that there is no right to be impaired by the retroactive application of SB 1421 or that any reliance on that right is improper. First, no records over five years old may be produced through a *Pitchess* motion, and therefore the privacy interest in those records is substantial, as they otherwise could not be produced. Second, the amount of information required to be produced by Penal Code section 832.7, subdivision (b)(2) far exceeds what is generally required to be produced following a *Pitchess* motion. As the Supreme Court recognized, "an order of disclosure ordinarily involves revelation of only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679.) Third, anything produced pursuant to a *Pitchess* motion is kept largely confidential, as the statute "*requires* the court to impose a protective order providing that the "records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." (*Id.* at pp. 679-80; emphasis in original.) In contrast here, the records would be public with no limitation placed on their use or distribution. Accordingly, merely because some information may be disclosed in limited fashion following a *Pitchess* motion does not mean that peace officers lack any privacy interest in their personnel records such that a statute removing all privacy protections would not have retroactive effect.

For this reason, *People v. Superior Court of Orange County* (*Smith*) (2018) 6 Cal.5th 457 is distinguishable. In that case, which concerned the alleged confidentiality of communications with mental health professionals and whether such records could be disclosed in a proceeding under the Sexually Violent Predator Act, the Supreme Court stated, "it is not clear why Smith assumed his conversations with these professionals would necessarily remain forever confidential." (*Id.* at p. 6.) The Supreme Court then cited the fact that appellate courts had split on the question of whether such records could be disclosed and that attorneys could have obtained those records even before the statutory amendment. (*Ibid.*) Here, on the other hand, peace officers have received assurances that their information would be kept confidential absent limited circumstances with a protective order.

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III. CONCLUSION

For the foregoing reasons, and all those stated in Petitioners' TRO Applications, Petitioners respectfully requests the Court issue the requested preliminary injunction, and grant all other requested relief.

Dated: February 6, 2019

Respectfully Submitted,

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Richmond Police Officers' Association
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PROOF OF SERVICE

I, Michelle Soto-Vancil, am a citizen of the United States, and am over 18 years of age. I am employed in Contra Costa County and am not a party to the above-entitled action. My business address is Rains Lucia Stern St. Phalle & Silver, PC, 2300 Contra Costa Blvd., Suite 500, Pleasant Hill, California 94523. On **February 6, 2019** I served a true and correct copy(ies) of the following document(s):

- **PETITIONERS' REPLY TO OPPOSITIONS OF INTERVENORS ACLU OF NORTHERN CALIFORNIA AND RICHARD PEREZ**

upon all parties addressed as follows:

Walnut Creek Police Officers' Association v. City of Walnut Creek, et al.; Case No.: N19-0109

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Contra Costa Deputy Sheriffs' Association v. County of Contra Costa, et al.; Case No.: N19-0097

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on February 6, 2019, at Pleasant Hill, California.

Michelle Soto-Vancil